(1)

Supreme Court, U.S.
FILED

No. _____

04 622 NOV 5 - 2004

In the
Supreme Court of the United States

MICHAEL NEGELE,

Petitioner,

v.

JOHN ASHCROFT, ATTORNEY GENERAL,
UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

D. WARREN HOFF, JR.
Counsel of Record
P.O. BOX 16061
ST. LOUIS, MO 63105
7700 CLAYTON RD., SUITE 306
ST. LOUIS, MO 63117
(314) 920-2164

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTIONS PRESENTED

Whether or not the Eighth Circuit Court of Appeals incorrectly relied upon the doctrine of collateral estoppel by refusing to consider the lack of discussion of the issue of voluntariness in determining whether or not the BIA correctly concluded that the Petitioner had engaged in persecution.

Whether or not the *Fedorenko* decision regarding the meaning of persecution and the decisions which it has spawned in the various circuit courts of appeals concerning the meaning of persecution of others under the immigration laws needs to be clarified to show that in fact voluntariness of service is an important consideration in deciding these cases.

PARTIES TO THE PROCEEDING

The Petitioner is an individual, Michael Negele.

The Respondent is John Ashcroft, Attorney General of the United States of America.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Cited Authorities v

Opinions Below 1

Statement of Jurisdiction 1

Statutory Provisions Involved 1

Statement of the Case 2

Reasons for Granting the Writ 3

Conclusion 9

Appendix

Appendix A
Eighth Circuit Order Denying Petition for Rehearing dated August 6, 2004 . . . . . 1a

Appendix B
Eighth Circuit Court of Appeals Opinion dated June 1, 2004 . . . . . 3a

Appendix C
Board of Immigration Appeals Decision Dated August 28, 2003 . . . . . 11a

TABLE OF CITED AUTHORITIES

Page

Cases

County of Cook v. MidCon Corp., 773 F.2d 892 (7th Cir. 1985) 5

Fedorenko v. United States, 449 U.S. 490, 101 S.Ct. 737 (1981) . . . . . *passim*

Hernandez v. Reno, 258 F.3d 806 (8th Cir. 2001) 3, 7

Negele v. Ashcroft, 368 F.3d 981, *rehearing denied,* (8th Cir. 2004) (*Negele II-A*) 1, 3, 5

Petkiewytsch v. INS, 750 F.2d 871 (6th Cir. 1991) . 7

Lapenieks v. INS, 750 F.2d 1427 (9th Cir. 1985) . . 7

Schellong v. INS, 805 F.2d 655 (7th Cir. 1986) . . 4, 7

United States v. Negele, 222 F.3d 443, (8th Cir. 2000), *cert. denied* 531 U.S.1135 (2001) *(Negele I-A)* 2, 4

United States v. Negele, 1999 U.S. Dist. LEXIS 22647 (E.D.Mo. February 26, 1999) (*Negele I-D*) 2, 3, 4, 5

Statutes

8 U.S.C. § 1101(a)(42) 2

8 U.S.C. § 1182(a)(3)(E) (Holtzman Amendment) . . . . . 1 , 5, 7, 8

8 U.S.C. § 1227(a)(4)(D) 1

8 U.S.C. § 1229(b)(c)(4) 1

8 U.S.C. § 1231(b)(3)(B) 2

8 U.S.C. § 1259 1
8 U.S.C. § 1427(a) 2
8 U.S.C. § 1451(a) 2
28 U.S.C. § 1254(1) 1
62 Stat. 1009 (1948) (Displaced Persons Act) 2

OPINIONS BELOW

The opinion of the Eighth Circuit (App. B, p. 3a) is reported as *Negele v. Ashcroft*, 368 F.3d 981, *rehearing denied,* (8th Cir. 2004), and the unreported administrative decision of the Board of Immigration Appeals (BIA) is included in the Appendix (App. C, p. 11a). The opinion and order of August 6, 2004, of the Eighth Circuit, denying Petitioner's Motion for Rehearing, is also included in the Appendix (App. A, p. 1a).

STATEMENT OF JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on June 1, 2004. The Court of Appeals entered its order denying a timely petition for rehearing and petition for rehearing en banc on August 6, 2004.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the definition of persecution as found in the Holtzman Amendment usually cited as 8 U.S.C. 1182(a)(3)(E).[1] It also involves the definition of persecution

---

[1] In fact, Petitioner was ordered deported under 8 U.S.C. 1227(a)(4)(D), which references the above-mentioned section of the immigration laws. In addition, other provisions of the immigration laws make the Petitioner ineligible for Cancellation of Removal (8 U.S.C. 1229(b)(c)(4)) or Registry (8 U.S.C. 1259), which would otherwise be likely forms of relief from deportation in the case of an individual with a long residency in the United States and no criminal history.

of others as found in 8 U.S.C. 1101(a)(42) (concerning eligibility for political asylum) and 8 U.S.C. 1231(b)(3)(B) (concerning eligibility for withholding of deportation). Finally, it involves the Displaced Persons Act, 62 Stat. 1009 (1948), as interpreted in *Fedorenko v. United States*, 449 U.S. 490, 101 S.Ct. 737 (1981).

STATEMENT OF THE CASE

Michael Negele was inspected and admitted to this country by the Immigration and Naturalization Service (INS) on March 22, 1950, and naturalized pursuant to 8 U.S.C. Sec. 1427(a) (Sec. 316(a) of the 1952 Act) by order of the district court in St. Louis on September 9, 1955.

On September 2, 1997, the Government, represented by the Office of Special Investigations (OSI), Department of Justice, filed a Complaint demanding revocation of the order admitting Michael Negele to citizenship and canceling the certificate of citizenship on the ground that his naturalization was illegally procured pursuant to 8 U.S.C. Sec. 1451(a). Although officially unreported, this case may be found at *United States v. Negele*, 1999 U.S. Dist. LEXIS 22647 (E.D.Mo. February 26, 1999) (*Negele I-D*); the district court opinion was upheld as to the "hostile movement" count only in a decision reported at *United States v. Negele*, 222 F.3d 443, (8th Cir. 2000), *cert. denied* 531 U.S.1135 (2001) *(Negele I-A)*.

Subsequently the Government issued a Notice to Appear seeking to revoke Negele's status as a lawful permanent resident. This case was heard before the Immigration Judge (IJ) based upon documentary submissions of the parties. The IJ found Negele deportable and ineligible for relief from deportation. Negele timely appealed his case to the Board of

Immigration Appeals (BIA), and a single Board Member issued a decision affirming the IJ's decision. A Petition for Review to the Eighth Circuit followed and was decided, in a decision reported as *Negele v. Ashcroft*, 368 F.3d 981, *rehearing denied,* (8th Cir. 2004) (*Negele II-A*). This is a petition for certiorari from *Negele II-A*.

REASONS FOR GRANTING THE WRIT

The Court below clearly erred by relying on the district court opinion in *Negele I-D* in order to be able to disregard the issue of voluntariness under *Fedorenko*.

In his Brief below, the Petitioner raised the issue that the circuit court's own decision in *Hernandez v. Reno*, 258 F.3d 806 (8th Cir. 2001), was at odds with the fact that Petitioner had been forcibly conscripted into the Waffen SS. Petitioner raised the issue again in his Petition for Rehearing. The Eighth Circuit in *Negele II-A* did not discuss the impact of its decision in *Hernandez v. Reno* in either its decision in chief or in its order denying the Petition for Rehearing. The only discussion of the issue of voluntariness was when the Eighth Circuit found that there was no need to consider it by stating as follows:

> The district court in the denaturalization proceedings specifically rejected Negele's claims of being drafted into the Waffen SS as unbelievable, and found Negele served voluntarily as an SS Death's Head Battalion guard.

Negele II-A, App. B at 9a.

However, the reliance by the Eighth Circuit in *Negele II-A* on the District Court's opinion in *Negele I-D* is misplaced.

The District Court there found that Petitioner should be denaturalized on three counts: (1) for serving in a "movement hostile to the interests of the United States," (2) for making material misrepresentations in applying for a visa to come to the United States, and (3) for entering the United States in violation of State Department regulations. The Eighth Circuit decision in *Negele I-A* is, however, based solely on the ground that Negele's service in the Waffen SS made him ineligible for a visa and thus he was not entitled to naturalization. As a number of courts have pointed out, if the Congress had intended to make an exception for service in a "hostile movement" due to involuntariness, it would have done so in the statute. Therefore, the issue of Negele's voluntary or involuntary service under the "hostile movement" provision of the DPA was not important. So any decision that the district court might have made regarding voluntariness, which was not considered by the Eighth Circuit in *Negele I-A*, should have been disregarded.

The Eighth Circuit itself in *Negele I-A* made the finding that involuntariness was not an issue in denial of a visa under the "hostile movement" provision. *Negele I-A*, at 446. Therefore, the finding by the district court that Petitioner's Waffen SS service was voluntary does not meet the requirement for collateral estoppel that "the issue was necessary to the judgment." *Schellong v. INS*, 805 F.2d 655, 658 (7th Cir. 1986)

Persecution was not an issue in the *Negele I* decisions because it was discovered that the visa under which Negele came was not an ordinary Displaced Persons Act visa. Had it been so, the visa would have been subject to the requirements of the International Refugee Organization which included a provision disallowing persons who had "persecuted others" from becoming refugees. Therefore, not only was the

issue of involuntariness unnecessary to the verdict in *Negele I-D*, but there was no identity of issues in that proceeding with the issues in the proceeding before the immigration authorities and the Court of Appeals in *Negele II-A*. *See County of Cook v. MidCon Corp.*, 773 F.2d 892, 898 (7th Cir. 1985).

The ruling of the Eighth Circuit in *Negele II-A* was thus improperly based on a finding of the District Court in *Negele I-D* and the court never properly reached the issue of whether voluntariness makes a difference in the context of a removal proceeding under the Holtzman Amendment.

The *Fedorenko* decision has been relied upon not only in the context of whether one has "persecuted others" during the time of the Nazi regime of World War II, but also regarding whether or not one is disallowed political asylum or withholding of deportation due to actions taken in more recent conflicts. The Court has not addressed the issue of persecution of others since *Fedorenko*, and it should consider the various decisions relying on *Fedorenko* to clarify and elucidate the footnote which is often cited when a definition of persecution is called for. Granting the writ in this case would give the Court an opportunity to resolve the conflicts of the various Courts of Appeals in interpreting this important decision, as well as give the federal courts and agencies who are charged with interpreting this term guidance as to its meaning in the various contexts in which it occurs.[2]

---

[2] One issue which is not intended to be addressed here is the definition of persecution against the person who is the subject of a claim for political asylum. The term persecution as used here is intended to be considered only in the context of situations where it might disqualify an individual due to his complicity in committing it.

Fedorenko v. United States, 449 U.S.490 (1981), is the sole decision of the Court which has addressed the meaning of persecution during the time of the Nazi persecutions of World War II. In footnote 34, the opinion by Justice Marshall states as follows:

> The solution to the problem perceived by the District Court [in *Fedorenko*] lies not in "interpreting the [Displaced Persons] Act to include a voluntariness requirement that the statute itself does not impose, but in focusing on whether particular conduct can be considered assisting in the *persecutions* of civilians. Thus, an individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave a concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians. Other cases may present more difficult line-drawing problems but we need decide only this case. . . . .

Fedorenko v. United States, supra,. at 513.

Rather than giving a definition of the term, this footnote states that determining persecution under the Displaced Persons Act is a line-drawing exercise. It has given courts latitude to find some individuals ineligible for benefits while finding others not to be disqualified in very similar circumstances. Seldom, however, have the courts or

administrative agencies engaged in the type of exercise which ought to be carried out in a line drawing situation. That is, they have not weighed the various nuances of the conduct of the individual against whom the disqualification is sought.

The application of the *Fedorenko* footnote was at issue in the Eighth Circuit decision *Hernandez v. Reno*, *supra,* which implicated the activities of a Guatemalan asylum applicant who had been required against his will to participate in activities which certainly seemed persecutory in nature, including engaging in a firing squad where he stated he tried to aim somewhat away from the person targeted. The BIA denied asylum on the basis of his having engaged in persecution but the Eighth Circuit reversed and remanded for further consideration in light of *Fedorenko*.

A number of circuit court decisions involving the issue of persecution in the context of concentration camp guards, as here, have concluded with little discussion, that the Holtzman Amendment makes them deportable. See for example *Schellong v. INS, supra*. On the other hand, other courts have not been so charitable to the government and have found the amendment to be ambiguous such that it was necessary to refer to the legislative history to determine the intent of Congress. *Petkiewytsch v. INS,* 750 F.2d 871, 879-80 (6th Cir. 1991). *See also Lapenieks v. INS*, 750 F.2d 1427 (9th Cir. 1985). When these latter cases are considered, one wonders how their results can be squared with the results of the Seventh Circuit and others which have given short shrift to any discussion of the meaning of the term persecution in cases involving Nazi concentration camp guards.

Eventually the Holtzman Amendment's usage will terminate due to the deaths of those who might have been implicated in the activities of the Nazi regime of World War

II. Due to lapse of time, the ones who are targeted for deportation under this law at the present time were the youngest recruits possible at the time of the war. Their youth at the time of their induction into the service of the Nazi regime ought to be a mitigating factor in their favor. They were not long-time Nazis. But more important, due to their advanced age and in many cases, ill-health, the Court's action to consider this issue now is the last chance that there can be a review of the meaning of the term "persecution" which will be meaningful to these men such as the Petitioner, almost all of whom have led exemplary lives since immigrating to the United States, and whose children are native-born United States citizens who must bear the financial and emotional cost of their defense.

For all these reasons, it is important for this Court to take the opportunity to address one or more of the following questions: (1) whether the meaning of persecution under the Holtzman Amendment is different from the meaning ascribed to it in *Fedorenko*; (2) regardless of whether the meaning of the term is the same, is the type of line-drawing analysis used in *Fedorenko* appropriate in a Holtzman Amendment case; and (3) what additional factors must or ought to be considered in determining persecution under the Holtzman Amendment beyond the sketchy description in *Fedorenko*'s footnote 34.

CONCLUSION

For the foregoing reasons, the petitioner respectfully prays that this Court grant the petition for writ of certiorari in order to consider the decision of the U.S. Court of Appeals for the Eighth Circuit below.

Respectfully submitted,

D. WARREN HOFF JR.
Counsel of Record
P.O. Box 16061
St. Louis, MO 63105
7700 Clayton Rd., Suite 306
St. Louis, MO 63117
(314) 920-2164

NOVEMBER 2004

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-3177

[Filed August 6, 2004]

Michael Negele,	)
Petitioner,	)
	)
v.	)
	)
John Ashcroft, Attorney General of the	)
United States; Thomas Ridge, Director of	)
Homeland Security,	)
Respondents.	)
	)

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Raymond W. Gruender took no part in the consideration or decision of this matter.

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 03-3177

[Filed June 1, 2004]

Michael Negele, Petitioner,	)
v.	)
John Ashcroft, Attorney General of the United States; Thomas Ridge, Director of Homeland Security, Respondents.	)

JUDGES: Before WOLLMAN, HANSEN, and BYE, Circuit Judges.

OPINION

BYE, Circuit Judge.

Michael Negele appeals the decision of the Board of Immigration Appeals (BIA) dismissing his appeal of an order directing his removal to Romania pursuant to the Holtzman Amendment, 8 U.S.C. § 1182(a)(3)(E)(i). This Amendment

mandates the removal of any person who, in association with Nazi Germany or its allies during World War II, ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion. We affirm.

I

A. Factual Background[1]

Negele, ethnically German, was born in Romania in 1920. During World War II, Negele served in the Death's Head unit of the Waffen *Schutzstaffel* (SS), which was responsible for operating and guarding concentration camps. In this capacity, Negele guarded civilian prisoners at the Sachsenhausen concentration camp and at Theresienstadt, an internment camp that held Jews and other prisoners awaiting transport to the death camps. Specifically, Negele policed the exterior of these camps with his guard dog, preventing prisoner escapes.

Following the War, Negele obtained United States citizenship by concealing his wartime service in the SS. He now resides in St. Peters, Missouri.

B. Procedural Background

In 1997, the government filed a complaint seeking to revoke Negele's citizenship, which ultimately proved to be

---

[1] For purposes of this opinion, we provide only a general description of the facts. A more thorough discussion of the facts may be reviewed in the panel opinion in the denaturalization proceedings, *United States v. Negele*, 222 F.3d 443, 445-46 (2000).

successful. *See United States v. Negele*, 222 F.3d 443, 447-48 (8th Cir. 2000).

On March 5, 2001, the government filed a Notice to Appear (NTA) charging that Negele was subject to removal pursuant to the Holtzman Amendment, 8 U.S.C. § 1182(a)(3)(E)(i). The NTA alleged Negele ordered, incited, assisted, or otherwise participated in the persecution of persons because of race, religion, national origin or political opinion between March 23, 1933, and May 8, 1945, under the direction of or in association with the Nazi government of Germany. Immigration Judge Bruce W. Solow entered a decision and order directing Negele be removed to Romania. This decision was based on the evidence presented by the government at Negele's denaturalization trial. On August 28, 2003, the BIA dismissed Negele's appeal of the immigration judge's order. This appeal followed.

II

This court reviews for substantial evidence the factual findings underlying the BIA's denial of an appeal. *Regalado-Garcia v. INS*, 305 F.3d 784, 787 (8th Cir. 2002). Those findings must be upheld if they are supported by "reasonable, substantial, and probative evidence, based on the record as a whole." *Valioukevitch v. INS*, 251 F.3d 747, 749 (8th Cir. 2001). We review the BIA's legal determinations de novo, "according substantial deference to the [BIA's] interpretation of the statutes and regulations it administers." *Regalado-Garcia*, 305 F.3d at 787 (citing *Tang v. INS*, 223 F.3d 713, 718 (8th Cir. 2000)).

The government is required to establish by clear and convincing evidence Negele is subject to removal. 8 U.S.C. § 1229a(c)(3)(A). Title 8 U.S.C. § 1227(a) provides an alien

"shall . . . be removed" if he falls within one or more of a specified class of deportable aliens. The NTA in this case charged that Negele was removable under 8 U.S.C. § 1227(a)(4)(D), which mandates the removal of any alien described in clause (i) or (ii) of 8 U.S.C. § 1182(a)(3)(E), the Holtzman Amendment.

The Holtzman Amendment states at subsection (i):

> Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with -
>
> (I) the Nazi government of Germany,
>
> (II) any government in any area occupied by the military forces of the Nazi government of Germany,
>
> (III) any government established with the assistance or cooperation of the Nazi government of Germany, or
>
> (IV) any government which was an ally of the Nazi government of Germany,
>
> > ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion is inadmissible [to the United States].

Congress enacted the Holtzman Amendment in 1978 to ensure "that the United States is not a haven for individuals who assisted the Nazis in the brutal persecution and murder of millions of people." *Schellong v. INS*, 805 F.2d 655, 662 (7th Cir. 1986).

It is undisputed both Sachsenhausen and Theresienstadt were places of persecution where Jewish civilians and political prisoners were forcibly confined under hideous and often deadly conditions solely because of their race or religion. Thus, the primary question in this case is whether Negele's dog-handling and guard duties constitute assistance in persecution under the terms of the Holtzman Amendment.

Negele contends his duties were entirely limited to dog-handling and therefore he does not fit the description of persons who are intended to be deported under the Holtzman Amendment. The crux of his position is: because the record does not reflect he ever shot at prisoners or took any other direct action to persecute them he did not participate in persecution under the terms of the Holtzman Amendment. We disagree, and believe the BIA properly found the documentary evidence and testimony from the denaturalization trial established that as an armed ghetto and concentration camp guard for the SS Death's Head Battalion Negele assisted in Nazi persecution. Therefore, he is subject to removal under the Holtzman Amendment.

Although the Eighth Circuit has not previously addressed the specific issue presented in this case, our conclusion is supported by the overwhelming weight of authority emanating from other circuit courts which have addressed the issue. *See Tittjung v. Reno*, 199 F.3d 393, 398 (7th Cir. 1999) (concluding Tittjung's service as an armed SS Death's Head Battalion concentration camp guard constituted assisting in persecution within the meaning of the Holtzman Amendment); *Hammer v. INS*, 195 F.3d 836, 843 (6th Cir. 1999) (upholding a removal order against a former SS Death's Head Battalion guard); *Kalejs v. INS*, 10 F.3d 441, 444 (7th Cir. 1993) ("The Holtzman Amendment's non-criminal provision

thus makes *assistance* in persecution an independent basis for deportation, and assistance may be inferred from the general nature of the person's role in the war") (emphasis in original); *Kairys v. INS*, 981 F.2d 937, 943 (7th Cir. 1992) (stating that as effective aiders and abettors of the [Nazi] conspiracy the armed guards are subject to deportation under the Holtzman Amendment); *Kulle v. INS*, 825 F.2d 1188, 1192 (7th Cir. 1987) ("Because the statute authorizes deportation of anyone who 'assisted' in persecution, personal involvement in atrocities need not be proven."); *Schellong*, 805 F.2d at 661 ("Nazi concentration camps were places of persecution; individuals who, armed with guns, held the prisoners captive . . . with threats of death or capital punishment cannot deny that they aided the Nazis in their program of racial, political and religious oppression.").

In support of his position the Holtzman Amendment requires particularized proof of individual atrocities by him, or evidence that he volunteered for service as an SS Death's Head Battalion Guard, Negele primarily relies on the case of *Petkiewytsch v. INS*, 945 F.2d 871 (6th Cir. 1991). In *Petkiewytsch*, the Sixth Circuit decided service at the German labor camp did not satisfy the requirements for deportability under the Holtzman Amendment.

In *Petkiewytsch* the individual was forced to work as a civilian labor guard under threat of imprisonment or execution (and was actually imprisoned for failing to adequately perform his duties); served at the least repressive type of Nazi camp; served reluctantly and at a young age and had not engaged in any persecution of a particular person. *Id.* at 880-81. Considering these mitigating factors, the court reasoned such language included in the legislative history of the Holtzman Amendment might require active participation in persecution going beyond assistance. *Id.* at 880.

Petkiewytsch does not control our decision in this case, because, among other reasons, it is limited to the unique mitigating facts of the case. In the later case of *Hammer v. INS*, 195 F.3d 836 (6th Cir. 1999), the Sixth Circuit concluded Hammer, a Death's Head Battalion guard, could be removed under the Holtzman Amendment. The court explained:

> *Petkiewytsch* thus appears to stand for the proposition that some forms of 'assistance' to the Nazi regime (such as membership, without more, in an organization which cooperated with the Nazis) may be too attenuated to be considered 'under the direction of, or in association with' the Nazi government. We do not believe that *Petkiewytsch* compels the conclusion that 'assistance' to the Nazi regime can never be sufficient for deportation under the Holtzman Amendment, because such an interpretation would be squarely at odds with the text of the statute.

Id. at 844.

It should also be noted the mitigating factors in *Petkiewytsch* are not present in this case. The district court in the denaturalization proceedings specifically rejected Negele's claims of being drafted into the Waffen SS as unbelievable, and found Negele served voluntarily as an SS Death's Head Battalion guard.

We conclude that by impeding prisoners' escape through his presence as an armed SS Death's Head Battalion Guard, Negele was actively and personally involved in persecution. By guarding the perimeters of the camps with a trained guard dog to ensure prisoners did not escape from life-threatening conditions, Negele contributed to the persecution which

occurred in these facilities. There is little doubt the prisoners within the facilities Negele patrolled with his dog (trained to "tear to pieces anyone else except the trainer") would have considered him as part of the Nazi machine which kept them at death's gate.

III

We deny Negele's petition for review and affirm the opinion and order of the BIA.

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

August 28, 2003

File: A07 443 824 - St. Louis

In re: MICHAEL NEGELE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: D. Warren Hoff, Jr., Esquire

ON BEHALF OF DHS: Jeffery L. Menkin
William Henry Kenety V
Senior Trial Attorneys
Office of Special Investigations
Department of Justice

CHARGE:

Notice: Sec. 237(a)(4)(D), I&N Act [8 U.S.C. § 1227(a)(4)(D)]- Assisted in Nazi persecution or engaged in genocide

APPLICATION: Termination of proceedings

In a decision dated July 3, 2002, the Immigration Judge found the respondent removable under section 237(a)(4)(D) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(4)(D), and ordered him removed from the United States. The respondent has appealed, arguing, inter alia; that his service in the Waffen SS does not rise to the level of persecution required to establish that he is removable. The appeal will be dismissed. The request for oral argument is denied, *See* 8 C.F.R.§ 3.1(e).

I. PROCEDURAL HISTORY

The respondent is an 82 year old ethnic German and native of Romania who was issued a quota visa on February 23, 1950, pursuant to the Immigration Act of 1924, and section 12 of the Displaced Persons Act of 1948[1], Pub.L. No.

---

[1] The DPA provided immigrant visas for European refugees after World War II. Section 2(b) of the DPA provided: "'Displaced person' means any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization and who is the concern of the International Refugee Organization." Annex I of the International Refugee Organization ("IRO") Constitution, in turn, excluded from the definition of "refugee or displaced person" any person who had "assisted the enemy in persecuting civil populations of countries, Members of the United Nations." Section 13 of the DPA, as amended by Pub. L. No. 81-

80-774, 62 Stat. 1009, as amended by Publ L. No. 81-555, 64 Stat. 219 (1950) ("DPA"). On March 22, 1950, the respondent entered the United States and on September 9, 1955, the United States District Court for the Eastern District of Missouri (District Court) granted his petition for naturalization.

A. Denaturalization

In September 1997, the Government brought a denaturalization action against the respondent in the District Court, alleging that he had procured his citizenship by concealing or willfully misrepresenting his wartime service as an armed guard in the Waffen SS Totenkopfsturmbann ("Death's Head Battalion")[2] at the Sachsenhausen concentration camp in Germany and at the Theresienstadt Jewish ghetto in Nazi-occupied Czechoslovakia. The District Court held a bench trial in April 1999. The District Court's findings of fact and conclusions of law credited the testimony of an expert Witness who opined that Waffen SS Death's Head guards were automatically rejected for immigration, whether they served voluntarily or not. The District Court

---

555, 64 Stat. 219 (1950), specified that "[n]o visas shall be issued ... to any person who advocated or assisted in the persecution of any person because of race, religion, or national origin.

[2] "SS" is the acronym for "Schutzstaffel," or protection squad. It developed into the elite guard of the Nazi dictatorship. After the outbreak of war in 1939, the "Waffen SS," or armed SS, was formally created as the militarized branch of the SS. The Waffen SS included the Death's Head Battalions, previously known as the Death's Head Units, which guarded the various concentration camps.

relied upon the Government's documentary evidence[3] showing that the United States categorically rejected individuals because of their service in the Waffen SS Death's Head guard battalion at Sachsenhausen. On July 20, 1999, the District Court issued a comprehensive memorandum opinion concluding that the respondent was ineligible for an immigration visa as a consequence of his service in the Waffen SS, Death's Head Battalion, and therefore ineligible for citizenship.

---

[3] The record reflects that the respondent joined the Waffen SS as a Death's Head guard in 1943 and from 1943 to 1944, he guarded civilian prisoners at the Sachsenhausen concentration camp. The Sachsenhausen camp obtained the labor of prisoners before they died. The camp essentially worked prisoners to death. Death's Head guards at the camp kept track of prisoners, guarded the slave-labor details outside the camp, and brought the prisoners back to camp at night. Guards were trained to perform various duties. They received weapons instruction in rifles and pistols, drill instruction in identifying and guarding prisoners and loading and unloading prisoners from trains. The guards at Sachsenhausen were instructed to shoot prisoners who attempted to escape the camp. The respondent received special training with guard dogs which were frequently used around the prisoner work details. The Waffen SS trained dogs to attack prisoners when they attempted to escape the camp. In. 1944, the respondent was transferred to Theresienstadt, a Jewish ghetto which operated as an internment camp that held Jews and other prisoners awaiting transport to the death camps. The respondent with his guard dog policed the exterior of the ghetto, attempting to prevent prisoner escapes. Guards at Theresienstadt also ensured the transport of prisoners to the trains destined for Auschwitz and other death camps. *See U.S. v. Negele,* 222 F.3d 443 at 445 (8th Cir. 2000).

B. Proceedings Before the Immigration Judge

On March 2, 2001, the Immigration and Naturalization Service ("the Service," now the Department of Homeland Security, "the DHS") and the Office of Special Investigations (OSI) issued a Notice to Appear charging that the respondent was removable pursuant to section 237(a)(4)(D) of the Act, as an alien described in section 212(a)(3)(E)(i)(Holtzman Amendment), in that as a member of the SS Death's Head Guard Battalion at the Sachsenhausen Concentration Camp and at the Theresienstadt Jewish ghetto, he ordered, incited, assisted, or otherwise participated in the persecution of persons because of race, religion, national origin or political opinion between March 23, 1933 and May 8, 1945, under the direction of or in association with the Nazi government of Germany.

OSI indicated that it would not rely on the doctrine of collateral estoppel with respect to the denaturalization proceedings because the charge of removability was based principally upon the Holtzman Amendment. The respondent argued in rebuttal that OSI was unable to sustain its burden of proof with the evidence from the federal court proceedings. In this regard, we note that the evidence presented before the Immigration Judge was limited by agreement of the parties to the documentary submissions[4] introduced by the parties; no additional testimony was provided. OSI submitted selected portions from the respondent's denaturalization proceedings, which included sworn testimony, wartime Nazi records, and other documentary evidence. The respondent argued that any

---

[4] The submissions included the testimony, findings, and evidence from the denaturalization proceedings in the District Court and before the Eighth Circuit Court of Appeals.

documents based on a trial court finding of lack of credibility, the expert testimony from Dr. Charles Wright Syndor, Jr. and any pretrial stipulations should be excluded from the immigration proceedings. The Immigration Judge determined in response to the respondent's objections, that all materials submitted by both parties were to be considered as evidence. It was noted that in administrative removal proceedings, the Federal Rules of Evidence and the Federal Rules of Civil Procedure are not controlling. *See Matter of D-*, 20 I&N Dec. 827 (BIA 1994); *Matter of Grijalva*, 19 I&N Dec. 713 (BIA 1988); *Matter of Benitez*, 19 I&N Dec. 173, 174 (BIA 1984); *Matter of Magana*, 17 I&N Dec. 111, 115 (BIA 1979). Moreover, the regulations provide that in removal proceedings, an Immigration Judge may receive any oral or written statement into evidence that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing or trial. 8 C.F.R. § 240.7(a). To be admitted, evidence must be probative, its use must be fair, and it must not deprive an alien of due process. *Matter of Grijalva, supra; Matter of Barcenas,* 19 I&N Dec. 609 (BIA 1988). Upon review of the above, the Immigration Judge determined that the evidence conclusively demonstrated that the respondent was a member of the Waffen SS Death's Head Guard Battalion at Sachsenhausen Concentration Camp and at the Theresienstadt Jewish ghetto; that persecution occurred at Sachsenhausen and Theresienstadt; that proof of a voluntary intent in the persecution of others was not required and that the respondent's conduct at Sachsenhausen and Theresienstadt justifies a finding that he assisted or otherwise participated in the persecution of others while serving as a member of the Waffen SS Death's Head Guard Battalion.

II. PRIMARY ISSUE ON APPEAL

The respondent's arguments on appeal are confusing and difficult to follow. For example, he initially contests any findings insofar as they are based on the District Court's finding of lack of credibility, citing his conclusion that the District Court found he was not credible with respect to his service at Theresienstadt, specifically that he did not serve there. However, the evidence of record clearly reflects that all parties agree, and the District Court agreed as well, that he did, in fact, serve at Theresienstadt. *See* (Exh. 3, District Court Opinion at 40-42, 49-52, 73, 81, 86-87); *U.S. v. Negele, supra.* He further challenges the expertise of the Government's witness at the denaturalization trial[5], argues that there has been no finding that he engaged in any specific act of persecution and that the admissions he made before the District Court are protected by Federal Rule of Civil Procedure 36[6]. He next characterizes what he considers to be the primary issue on appeal–whether he ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion. In essence, he asserts that his service in the Waffen SS does not constitute assistance or participation in persecution as defined in the Holtzman Amendment such as to

---

[5] The respondent's challenge to Dr. Syndor's expertise pertains to the issue of whether or not the respondent was drafted against his will into the SS Death's Head Guard battalion. We note that Dr. Syndor's expertise is not at issue in this case. However, to the extent this argument goes to whether the respondent voluntarily participated in acts of persecution, this matter is discussed below.

[6] The respondent's argument regarding the applicability of the Federal Rules of Civil Procedure was addressed by the Immigration Judge as noted above and we adopt that rationale.

sustain a charge of removability, and this is what we consider to be the primary issue before us.

III. DEPORTABILITY

It is well settled that an individual's service during World War II as an armed concentration camp guard qualifies as assistance in persecution under the Displaced Persons Act of 1948 ("DPA") without proof of personal involvement in atrocities. *Fedorenko v. United States,* 449 U.S. 490 (1981); *United States v. Breyer,* 41 F.3d 884 (3d Cir. 1994); *United States. v. Schmidt,* 923 F.2d 1253 (7th Cir. 1991); *United States v. Kairys,* 782 F.2d 1374 (7th.Cir. 1986). In *Fedorenko supra,* the Supreme Court held that service as an armed concentration camp guard, whether voluntary or involuntary, was assistance in persecution for purposes of the Displaced Persons Act of 1948 ("DPA"). The Court explained that the omission of the word "voluntary" from the definition of "displaced person" under the DPA "compels the conclusion that the statute made *all* those who assisted in the persecution of civilians ineligible for visas." *Id.* at 512. However, to address the concern of the district court below that this interpretation of the term "assisted" could exclude survivors who had been forced to assist the SS in the operation of the camps, the Court stated that the focus should be on:

> whether particular conduct can be considered assisting in the *persecution* of civilians. Thus, an individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village,

> and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians. Other cases may present more difficult line-drawing problems....

Id. at n.34.

Although the Eighth Circuit has not specifically addressed the issue at bar, as noted by the Immigration Judge, other Circuits, including the Seventh and the Sixth have considered similar cases. The Seventh Circuit has ruled that a person who voluntarily joined a special commando unit of the SS, served as an armed guard at two concentration camps, but never participated in the physical abuse or prisoners had nevertheless engaged in conduct prohibited by the Holtzman Amendment. *See Schellong v. INS,* 805 F.2d 655 at 656-57 (7th Cir. 1986); *see also Naujalis v. INS*, 240 F.3d 642, 646 (7th Cir. 2001); *Kulle v. INS*, 825 F.2d 1188, 1192 (7th Cir. 1987). Moreover, in *Hammer v. INS,* 195 F.3d. 836, 843 (6th Cir. 1999), the Sixth Circuit held that the Holtzman Amendment may be satisfied without eyewitness testimony that an alien was personally involved in brutality.

The respondent contends that persecution under the Holtzman Amendment should not be interpreted in the same way as it is under the DPA, essentially arguing that a finding of persecution such as to satisfy the Holtzman Amendment without evidence of specific acts on the part of the respondent is an "errant theory." He cites to *Petkiewytsch v. INS,* 945 F.2d 871 (6th Cir. 1991)[7] as authority for the proposition that

---

[7] He also cites to *Laipenienks v. INS*, 750 F.2d 1427 (9th Cir. 1985), where the Ninth Circuit held that the proper analysis under the Holtzman Amendment was whether there was proof of

evidence of specific acts of persecution on the part of the respondent is necessary to sustain the charge of removability. In *Petkiewytsch,* the court held that an alien was not deportable under the Holtzman Amendment where he served involuntarily as a camp civilian guard and never personally abused prisoners. The court reviewed the legislative history of former section 241(a)(4)(D) of the Act, and found that it differed from the DPA in that its purpose was to reach Nazi war criminals. *Id.* at 879-80. To the court, language included in the legislative history "appear[ed] to require active participation in persecution going beyond 'assistance'" *Id.* at 880. Focusing on Petkiewytsch's "particular conduct," as instructed by the Supreme Court, the court observed that he did "not fit the description of a 'Nazi war criminal'...." *Id.* at 881. The court concluded that, "[g]iven all the circumstances" of the case, *Fedorenko* did not require a finding that Petkiewytsch was deportable under the Holtzman Amendment. *Id.* The respondent further argues, in light of the above, that he also has not been found to be a Nazi war criminal by any competent authority.

However as the court emphasized, Petkiewytsch was a civilian guard at a labor education camp who, following the war, was apprehended by the British as a suspected war criminal, but then released "under 'category 5,' which meant that he was totally exonerated of any wrongdoing and of all charges against him." *Id.* at 873. Labor education camps were the "least punitive of all types of Nazi camps." *Id.* at 881. No fence surrounded the Kiel-Hasse camp in Germany, where Petkiewytsch served. *Id.* at 874. While physical abuses,

---

personal, active assistance or participation in persecutorial acts. However, this case may be distinguished on it's facts as it involved a Lithuanian policeman who had investigated Soviet sympathizers and turned them over to the Nazis.

malnutrition, and overcrowded conditions were prevalent, prisoners typically were incarcerated for a period of just 56 days. *Id.* Moreover, the beatings and other such acts of persecution experienced by the prisoners were "primarily at the hand of SS guards present at the camp and more senior Gestapo officials rather than at the hand of civilian guards" like Petkiewytsch. *Id.* The court also considered the undisputed evidence that, Petkiewytsch's refusal to serve would have subjected him to imprisonment or execution and that, on one occasion, Petkiewytsch was in fact imprisoned for failing to perform his guard duties diligently. *Id.* at 872-73, 881. Therefore, Petkiewytsch's case presented the difficult line-drawing problems referred to by the Supreme Court in *Fedorenko. Id.* at 878. Unlike *Petkiewytsch,* this case presents no line-drawing problems. The respondent's service in the Waffen SS Death's Head Guard Battalion, including "[s]ervice as an armed guard...ensured the systematic destruction of concentration camp inmates." *See United States v. Schmidt,* 923 F.2d 1253, 1259 (7th Cir. 1991).

> If the operation of such a camp were treated as an ordinary criminal conspiracy, the armed guards, like the lookouts for a gang of robbers, would be deemed coconspirators, or if not, certainly aiders and abettors of the conspiracy; and no more should be required to satisfy the noncriminal provision of the Holtzman Amendment that makes assisting in persecution a ground for deportation.

Kairys v. INS, supra, at 943; *see also United States v. Koreh*, 59 F.3d 431, 442 (3d Cir. 1995) (finding that assistance in persecution does not require "personal participation . . . in the commission of physical atrocities."); *Kulle v. INS,* 825 F.2d 1188, 1193 (7th Cir. 1987) (explaining that in deportation cases, the "proof is directed toward showing

presence at a place of persecution, and 'assistance' in persecution is inferred from the circumstances); *Matter of Kulle*, 19 I&N Dec. 318 (BIA 1985) (holding that the term "persecution" includes the confinement of political prisoners, Jehovah's Witnesses, Protestant and Catholic clergy, Jews, and other opponents of the Nazi regime at the Gross-Rosen concentration camp); *Matter of Fedorenko, supra,* at 69 (finding that "the objective effect of the respondent's conduct as a perimeter guard would have been to aid the Nazis, in some small measure, in their confinement and execution of Jewish prisoners at Treblinka").

In view of the above, and overwhelming evidence of what amounts to the systematic persecution of persons because of race, religion, national origin, and political opinion under the concentration camp system, particularly at both the Sachsenhausen concentration camp and Theresienstadt Jewish ghetto, we find that by simply "impeding [prisoners'] escape through his presence" as an armed SS Death's Head Battalion Guard, *cf. Petkiewytsch v. INS, supra*, at 873, the respondent was actively and personally involved in persecution to a sufficient extent to fall within the scope of the Holtzman Amendment. No additional evidence of any specific act of persecution on the part of the respondent or other finding, including that the respondent is a "Nazi war criminal" is necessary in light of the above.

We emphasize that, under the plain language of the statute itself, an alien is deportable if he merely "assisted" in the persecution of others. *See Matter of Kulle, supra,* at 332; *Matter of Fedorenko, supra; see also Kalejs v. INS, supra,* at 444 ("The Holtzman Amendment's non-criminal provision thus makes assistance in persecution art independent basis for deportation, and assistance may be inferred from the general nature of the person's role in the war."). As the objective

effect of an alien's actions, not his motivation and intent, controls in determining whether he "assisted" in persecution, the voluntariness of his actions is irrelevant. *Matter of Fedorenko, supra*, at 69-70; *see Fedorenko v. United States, supra*, at 512; *United States v. Breyer, supra; United States v. Schmidt, supra,* at 1257-58; *Maikovskis v. INS,* 773 F.2d 435,445-46 (2d Cir. 1985); *see also Matter of Kulle, supra* ("Congress intended that all who assisted the Nazis in persecuting others must be deported regardless of the degree of voluntariness of such assistance.").

Thus, based, on the respondent's wartime service as an armed concentration camp guard, we find him removable under section 237(a)(4)(D) of the Act. We note, as did the Immigration Judge, that the respondent's removability under section 237(4)(D) of the Act renders him ineligible for any relief from removal[8].

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

/s/ _____
FOR THE BOARD

---

[8] The argument that the respondent is eligible for waiver pursuant to the holding in *INS v. St.Cyr,* 121 S.Ct. 2271 (2001) is without merit.